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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

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No. 75-1462

**DELAWARE REPUBLICAN STATE
COMMITTEE, et al.**

Petitioners,

v.

B. WILSON REDFEARN, et al.,

Respondents.

**PETITIONER'S RESPONSE TO RESPONDENT'S
SUGGESTION OF MOOTNESS AND MOTION TO
VACATE AND REMAND**

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STATEMENT OF THE CASE

Respondents filed their original complaint on December 1, 1972, in the United States District Court for the District of Delaware alleging deprivation of equal voting rights under Title 42, Section 1983 of the U. S. Code. The complaint sought both declaratory and injunctive relief under 28 U.S.C. 2201 and 2202 and specifically an Order compelling the Delaware Republican State Committee to allocate delegates to the Republican State

and National Conventions in a manner conforming to the principle of "one man, one vote." The District Court accepted jurisdiction under 28 U.S.C. 1343(3) and 1343(4) and the case was ultimately decided upon plaintiff's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The complaint challenged the constitutional validity of Rule 2 of the Republican State Committee. (Rule 2 is reflected as Appendix 1 attached herein.) Rule 2 provided for an allocation of 220 State Convention delegates in the following manner: (1) 120 delegates (54.5% of the total delegation) were allocated on the basis of 30 delegates to each of the four state convention districts and (2) the remaining 100 delegates (45.5% of the total delegation) were allocated on the basis of the percentage of the statewide Republican vote cast in certain specified prior elections.

The Republican Party of the State of Delaware is a voluntary association of individuals who have joined together in the furtherance of achieving certain political goals. The Delaware Republican Party is organized in accordance with the rules adopted by previous Republican state conventions held on May 4, 1970 and July 17, 1972. The membership of the Republican Party of Delaware consists of all persons who have indicated that they are Republicans by registering to vote in the State of Delaware.

In every even numbered year the Delaware Republican Party holds a state convention. In past state conventions, individuals were selected as the Party's nominees for national and state offices to be filled in the general election occurring in November of that year. That convention function, the selection of Republican candidates for national and state offices, has been

legislatively terminated. The second session of the 1976 Delaware State Legislature enacted legislation providing for primary elections and nominations of candidates for all offices, both state and Federal within the state. That legislation was enacted after a writ of certiorari was granted by this Court and renders moot certain judicial considerations regarding the application of the principle of one man, one vote to a delegate apportionment formula at a state Party's convention. Respondent's motion correctly describes the effect of that recently enacted legislation and accurately reproduces same in Appendix A.

Notwithstanding the termination of that convention function, in Presidential election years, the Republican State Convention will continue to select the individuals who shall serve as Delaware's Republican delegates and alternate delegates to the National Convention of the Republican Party. In other years the Republican State Convention is held for the purpose of electing a state chairman of the Republican Party and members of the Republican State Committee. The respondents have also challenged the allocation formula by which the Delaware delegates and alternates to the Republican National Convention are elected. Until Rule 2 was amended, the Delaware Party historically allocated these delegates on the basis of three delegates and three alternates from each of the four state convention districts.

Like the establishment of the challenged Rule 2 and the apportionment of delegates to the National Convention, the designation of four state convention districts resulted from the internal deliberations of the State Party at previous state party conventions. No state or Federal statute exists mandating the number of

state convention districts to be employed by either political party within the state and, similarly, no statute exists directing the method of selection of delegates to either the Delaware State Party convention and, from it, to the Republican National Convention. The State does provide the mechanics to determine, on any given day, the number and identity of registered Republicans within its borders. That number, of course, is fluid, changing daily with the whims and caprices of the electorate. Registered Republican voters are not required to vote for the Republican candidates in either primary or general elections.

Respondents alleged a violation of the Equal Protection Clause of the Fourteenth Amendment as the basis for relief. Respondents asserted that their voting strength had been unconstitutionally diluted in that their representation at the Republican State Convention and in the delegation to the Republican National Convention was not proportionate to the population, the number of registered Republicans or past Republican electoral strength in the second convention district.

The District Court granted plaintiffs' Motion for Summary Judgment, finding that the existing delegate allocation formula (Rule 2) was violative of the Fourteenth Amendment's guarantee of equal protection. The District Court enjoined the Republican State Committee from engaging in its practice of allocating a portion of state convention delegates on the basis of equal number of delegates to each convention district and from the traditional practice of allocating Republican National Convention delegates on the convention district basis. The Court ordered the Delaware State Republican Committee to adopt a delegate allocation formula for the state convention

consistent with the "one man, one vote" principle and a similar order was directed to individual district committees. 362 F. Supp. at 74-75. At the time of that ruling and of the subsequent ruling herein by the District Court and the Court of Appeals, the Delaware Republican Convention continued to perform the function of providing Party nominees as candidates for state and Federal offices.

An appeal was taken to the United States Court of Appeals, Third Circuit. A three-judge panel of the Court of Appeals reversed the District Court's judgment and remanded for further proceedings. 502 F.2d 1123 (1974). The three judges filed separate opinions: an "Opinion of the Court" filed by Judge Gibbons, a concurring opinion filed by Judge Aldisert, and a dissenting opinion filed by Judge Rosenn.

The "Opinion of the Court" first addressed itself to "The Effect of the District Court Order" (502 F.2d 1127-1128). Judge Gibbons held that in choosing to rule on the Delaware State Republican Party's own Rule, instead of the state statutes which give the rule the *de facto* force of state law, that the District Court may have unnecessarily intruded upon the state party's First Amendment right of association:

"But the court's decision to let stand the challenged statutes but hold invalid the internal party rules raises quite serious first amendment issues . . . Many believe that party success in achieving statewide or national political power is intimately related to success in achieving such power in the local substructures of government. Thus the ability of any party in Delaware to organize itself on a district rather than an at large basis may be, or is believed to be, significantly related to its pursuit of the power to impose its

policies upon government. The freedom to associate for such a pursuit is the heart of the right of association guaranteed by the first amendment." (502 F.2d 1127)

The opinion concluded:

"The statute under which the state intrudes its action into the party continues to operate, but at the expense of the freedom of association of the party." (502 F.2d 1127)

Judge Gibbons, speaking for the Court, reversed and remanded. "...because the district court... did not weigh the highly relevant associational rights of the party." (502 F.2d 1123 at 1128) (emphasis added). Thus, the Court of Appeals clearly recognized and clearly instructed the District Court to recognize and weigh the First Amendment rights of the Delaware Republican Party.

On remand, the District Court ignored that position of the Court of Appeals' decision requiring that consideration of the First Amendment rights of petitioners be measured against the Fourteenth Amendment claims of respondents. 393 F. Supp. 372 (1975). Instead, the Court somehow concluded that it "...may not be bound to consider the issue raised by Judge Gibbons..." (393 F. Supp. at 375), and thereafter considered the alternative to declaring Rule 2 unconstitutional. The District Court undertook a lengthy recitation of Delaware state political and statutory history seeking to demonstrate that by declaring the ballot access statutes unconstitutional, no direct party primary would result. (393 F. Supp. 375-379) The District Court was apparently of the erroneous belief that the Court of Appeals' directive related only to possible questions of creating a direct Republican Party

primary by holding state statutes unconstitutional. Such a ruling, the District Court correctly concluded, would not change the allocation of delegates to state party and national party conventions. Having thus partially ruled on the merits of the case, the Court thereupon reinstated its prior judgment.

The District Court's second judgment in this case suffers from precisely the same defects as the first: the Court did not weigh or consider the First Amendment association rights of the petitioners. The Court either ignored or fundamentally misinterpreted the opinion of the Court of Appeals, as Judge Gibbons clearly directed the District Court to consider and weigh the various alternatives to sacrificing the First Amendment rights of the party. (502 F.2d 1128) Yet, the District Court considered only whether declaring state statutes unconstitutional would create a direct party primary. Nowhere does the District Court evidence any consideration or concern for the party's right to organize itself, to set its own goals, or to make political judgments on issues affecting elections and organizational strategy. In short, the question of the party's First Amendment rights was entirely ignored by the District Court.

Appeal from this second judgment was again taken to the Court of Appeals for the Third Circuit. Thereafter, a second panel of that Court, comprised of Judge Aldisert and two different judges, entered a Judgment Order, without opinion, affirming the judgment of the District Court.

The second panel decision does precisely what the Opinion of the Court in the first panel found so objectionable— it evidences no consideration whatsoever for the First Amendment association rights of the petitioners.

ARGUMENT

When the Delaware Republican State Committee sought a Writ of Certiorari to the United States Court of Appeals for the Third Circuit from this Court, despite the fact that the legislation referred to in respondent's motion had not been enacted into law, it suggested the existence of three reasons justifying the issuance of the Writ. Notwithstanding the fact that the legislation is now the law of the Commonwealth of Delaware, the three reasons advanced by petitioners, seeking certiorari, remain viable and unaffected by that enactment.

Those reasons were that: (1) conflict exists among the Federal circuits respecting whether state party nominating conventions should be subject to the one man-one vote principle, (2) the degree and impact, if any, the First Amendment of the Federal Constitution has upon state political conventions, without regard to the functions performed by the delegates present at such conventions, and (3) whether litigation contesting the deliberations and conclusions of a state's political party are justiciable controversies. The legislative enactment, limiting the historical role performed at the Delaware State Republican Convention as it pertains to the nomination of elected public officials, does not impact upon the need for a definitive judicial pronouncement to these issues.

Respondent's motion suggests that the legislation has mooted the questions presented in this litigation and that no meaningful controversy remains between the parties. At page nine in their motion, respondents go so far as to speculate that, in light of the recent legislation, it is questionable whether the Republican

Party in Delaware will even, "undertake the considerable expense and effort of even convening a state nominating convention." That statement, like the suggestion of mootness and absence of controversy, ignores the multifarious political functions of Delaware State Republican conventions.

The legislation does not affect the state convention function of selecting the persons to serve as Delaware's delegates to the Republican National Party's quadrennial convention. Neither does it detract from the Delaware State Republican convention function of selecting Delaware's electors to the Electoral College.

The public office holder nominating function, heretofore directly performed at the state convention and now removed by legislation, remains indirectly involved in the state convention process through the selection of Delaware delegates to the Republican National Party's quadrennial convention held for the principal purpose of nominating the Party's candidates for President and Vice President of the United States.

Whether the forum from which a state delegation to a national convention is selected requires adherence to the principle of one man-one vote continues to be in controversy and is not mooted by the recently enacted legislation. Whether a voluntary association of state party people and their deliberations and conclusions during the course of such association, are protected rights within the First Amendment of the Federal Constitution continues to be in controversy within this litigation (and within the Federal circuits) and has not been mooted by an Act of the Delaware Legislature. And finally, whether judicial restraint in matters involving the association of politically motivated individuals intent upon achieving specific political goals

is justiciable continues to be in controversy in this case (and throughout the Federal circuits) and is not mooted by Delaware's legislative enactment.

Petitioners see no merit in the suggestion of yet another remand to the District Court. For if a remand should occur, Petitioners question what case law the District Court could look to for guidance in resolving the remanded issues. Respondents would no doubt urge the District Court to rely upon *Maxey v. Washington State Democratic Committee*, 319 F. Supp. 673 (1970), *Doty v. Montana State Democratic Central Committee*, 333 F. Supp. 49 (1971), *Seergy v. Kings County Republican County Committee*, 459 F.2d 308 (1972), and *Baker v. Carr*, 369 U.S. 186 (1962) as controlling. Petitioners, to the contrary, might be expected to urge the District Court to disregard those cases and rely instead upon *Irish v. Democratic-Farmer Labor Party of Minnesota*, 399 F.2d 119 (1968), affirmed 287 F. Supp. 794 (1968), *Smith v. State Executive Committee*, 288 F. Supp. 371 (N.D. Ga. 1968), *Cousins v. Wigoda*, 419 U.S. 477 (1975), *O'Brien v. Brown*, 409 U.S. 1 (1972) and *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 548 (D.C. Cir. 1975). The opportunity this case affords to the Supreme Court to provide judicial guidance to the various District and Appellate Courts throughout the nation in cases of this type is an

opportunity that should not be procedurally finessed through a selectively expedient claim of mootness.

Respectfully submitted,

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APPENDIX 1**Delaware Republican State Committee, et al.****Rule 2**

The State shall be divided into four (4) Convention Districts as follows: The City of Wilmington shall be known as the First Convention District; New Castle County, outside of the City of Wilmington, shall be known as the Second Convention District; Kent County shall be known as the Third Convention District; and Sussex County shall be known as the Fourth Convention District. The Republican State Convention shall consist of two hundred and twenty (220) delegates, with fifty-five (55) percent of the delegates being distributed equally among the four (4) Convention Districts and forty-five (45) percent on the basis of Republican vote. The distribution shall be made in the following manner: one hundred and twenty (120) delegates shall be distributed on the basis of thirty (30) delegates to each Convention District; one hundred (100) delegates shall be distributed among the Convention Districts on the basis of one (1) delegate for each one (1) percent of the Statewide Republican vote which was cast in each Convention District in the last Presidential election. The Republican vote shall be determined by averaging the vote for the Republican Candidates for State Treasurer and for State Auditor. The State Committee, at its first meeting following each Presidential election, shall fix the number of delegates for each Convention District pursuant to the formula set forth above.